

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH D. SMITH,

Defendant-Appellant.

UNPUBLISHED

June 12, 2003

No. 236006

Wayne Circuit Court

LC No. 00-013940-01

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and was sentenced to life imprisonment without parole. He appeals as of right. We affirm.

I

Defendant argues that prosecutorial misconduct deprived him of a fair trial. Generally, we review allegations of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, however, defendant did not preserve three of his claims of misconduct with an appropriate objection at trial. Unpreserved claims of misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Appellate relief is not warranted where a timely instruction could have cured any prejudice. *Id.*; *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

First, defendant argues that the prosecutor improperly vouched for the credibility of her witnesses, specifically Chad Smith. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A prosecutor is prohibited from vouching for a witness' credibility by suggesting that the government has some special knowledge that a witness will testify truthfully. *Id.* at 276; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). When a jury is faced with a credibility question, however, the prosecutor is free to argue a witness' credibility from the evidence. *Launsbury*, *supra* at 361.

In this case, defendant did not object to the challenged remarks at trial. Viewed in context, it is apparent that the prosecutor was arguing that Chad Smith was a credible witness on the basis of the evidence. Defendant has not shown that the prosecutor's remarks constituted plain error.

Second, defendant argues that the prosecutor improperly injected "innuendo" by insinuating, in her cross-examination of defendant, that if defendant's sister had testified at trial, she would have corroborated and bolstered the prosecution's case. Because defendant did not object to the prosecutor's cross-examination on this ground at trial, this issue is not preserved. Accordingly, we review it for plain error affecting defendant's substantial rights. *Carines, supra*. While we agree that the prosecutor's cross-examination in this respect was improper, reversal is not required, given that the prosecutor quickly abandoned the line of questioning and that a timely objection could have cured any prejudice.

Third, defendant argues that the prosecutor committed misconduct by having Sergeant William Prince testify in rebuttal that defendant's employer, Garrett Douglas, told him that defendant failed to pick up his last paycheck after the decedent's death. Defendant objected to Sergeant Prince's rebuttal testimony at trial on the basis that it pertained to a peripheral issue "that didn't warrant calling a rebuttal witness." On appeal, however, defendant argues that the rebuttal testimony was improper because the prosecutor had previously represented that Sergeant Prince would only be testifying about the circumstances of defendant's arrest.¹ Because defendant did not object to Sergeant Prince's rebuttal testimony on this basis at trial, the issue is not preserved. Accordingly, defendant must show a plain error affecting his substantial rights. *Carines, supra*.

Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996); *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). Proper rebuttal evidence includes testimony that contradicts the testimony of the other party's witness if the evidence tends to disprove the prior witness' testimony. *People v Vasher*, 449 Mich 494, 505-506; 537 NW2d 168 (1995). Evidence may not be introduced on rebuttal unless it relates to a substantive matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

In this case, defendant presented Garrett Douglas, who testified that defendant picked up his last paycheck. In rebuttal, the prosecutor called Sergeant Prince, who testified that he contacted Douglas about defendant and Douglas informed him that defendant never picked up his last paycheck. The prosecution was entitled to rebut Douglas' testimony on this point, and the testimony of Sergeant Prince was properly presented to contradict Douglas' contrary testimony. Moreover, contrary to defendant's claim at trial, in light of the evidence that defendant fled the state shortly after the decedent's death, the rebuttal testimony did not involve a peripheral matter. Thus, the prosecutor did not commit misconduct by presenting the rebuttal testimony at issue.

¹ Previously, the trial court allowed the prosecutor to add Sergeant Price to its witness list for the purpose of testifying about the circumstances of defendant's arrest.

Fourth, defendant argues that the prosecutor committed misconduct when she asked Garrett Douglas whether a prosecution witness was lying. It is improper for a prosecutor to attempt to discredit a defense witness by inviting him to comment on the credibility of a prosecution witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, however, the trial court sustained defense counsel's objection to the question. Further, defendant was not prejudiced because the questioning was brief, it did not involve a comment on defendant's guilt or innocence, and it did not bolster the credibility of the prosecution witness. Therefore, appellate relief is not warranted.

Fifth, defendant argues that the prosecutor committed misconduct during her rebuttal argument by referring to him as a liar. We disagree. "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief . . . and is not required to state inferences and conclusions in the blandest possible terms." *Launsbury, supra* at 361. At trial, defendant admitted that, after the decedent's death, he moved to Georgia and began using his uncle's name. The prosecutor's reference to defendant as a liar constituted proper commentary on the evidence.

II

Defendant argues that reversal is required because of instructional error. Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996). Even if imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Because defendant failed to object to the court's flight instruction, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra*. The evidence showed that, following the decedent's death, defendant fled to another state. This evidence was admissible to show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 399; 504 NW2d 666 (1993). In light of this evidence, the trial court's decision to instruct the jury on flight was not plain error.

The trial court also properly denied defendant's request for an instruction on voluntary manslaughter. First, to the extent our Supreme Court's decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002),² can be read as precluding an instruction on voluntary manslaughter, inasmuch as it is a cognate lesser offense of murder, see *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), the trial court's failure to instruct on manslaughter cannot be characterized as error. Second, to the extent the Supreme Court in *Cornell* did not intend to preclude consideration of manslaughter as a lesser offense of murder, defendant's request for an instruction on manslaughter was properly denied because the evidence did not support it. Defendant denied being present when the victim was killed, and further, there was no evidence supporting a finding of reasonable provocation. *Pouncey, supra* at 388-389.

² The decision in *Cornell* applies to this case because it was pending on appeal when *Cornell* was decided, and because defendant preserved the issue by requesting an instruction on voluntary manslaughter. *Cornell, supra* at 367.

III

The trial court properly denied defendant's motion to suppress the photographic identifications. Defendant was not in custody and, therefore, he was not entitled to counsel at the photographic lineup. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Moreover, we are not persuaded that this case falls within the exception to this rule recognized in *People v Cotton*, 38 Mich App 763, 769; 197 NW2d 90 (1972), where the police use a lineup to build a case against the defendant.

IV

Defendant argues that trial counsel was ineffective for failing to object to Sergeant Prince's rebuttal testimony. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). We find no merit to this issue. Sergeant Prince's rebuttal testimony was not improper. Accordingly, counsel was not required to make a meritless objection. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

V

Defendant challenges the trial court's instruction on reasonable doubt. Because defendant did not object to the court's reasonable doubt instruction at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. The record discloses that the court instructed the jury on reasonable doubt in accordance with CJI2d 3.2(3), which adequately presented the concept of reasonable doubt to the jury. The court's failure to instruct that a guilty verdict requires proof to a "moral certainty" or include "hesitate to act" language did not constitute plain error. See *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *Hubbard (After Remand)*, *supra* at 487; *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

VI

In light of the foregoing, we reject defendant's claim that the cumulative effect of several errors denied him a fair trial. *Knapp, supra* at 387-388; *Cooper, supra* at 659-660.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell